UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THERESA A. KOZLOWICZ, Plaintiff, vs. COMMISSIONER of SOCIAL SECURITY ADMINISTRATION, Defendant.	2:04-CV-01281-RCJ-(LRL) **ORDER**

This matter coming before the Court on Magistrate Judge Lawrence R. Leavitt's Report and Recommendation (#14), filed April 7, 2005, Plaintiff's Motion to Remand (#7), filed February 11, 2005, and Defendant's Motion for Affirmance (#10), filed March 18, 2005. The Court has considered the Motions, the pleadings on file, and oral arguments on behalf of the parties. IT IS HEREBY ORDERED that Magistrate Judge Lawrence R. Leavitt's Report and Recommendation (#14) is *affirmed*. Furthermore, IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (#7) is *denied*, and Defendant's Motion for Affirmance (#10) is *granted*.

FACTS

Presently before the Court is the Report and Recommendation (#14) entered by the Honorable Lawrence R. Leavitt on April 8, 2005. Pursuant to 28 U.S.C. §636(b)(1), the Plaintiff had ten days in which to file objections to the magistrate judge's Report and Recommendation. Plaintiff failed to file the objections and the time for filing the same has expired. Moreover, the magistrate judge properly determined that Plaintiff's Motion to Remand (#7) should be denied and that Defendant's Motion for Affirmance (#10) should be granted.

Plaintiff, Teresa A. Kozlowicz, is a fifty-six year old individual who alleges that she has been unable to work since December 1, 1990, due to neurological problems. Plaintiff had been insured for disability benefits under Title II of the Social Security Act through December 31, 1994. However, Plaintiff filed for disability on November 7, 2002. Plaintiff's claim was denied initially and upon reconsideration. A hearing was held before an Administrative Law Judge ("ALJ") on March 18, 2004. The ALJ found that Plaintiff did not have a disability within the meaning of the Social Security Act on or prior to the date last insured—December 31, 1994. The Appeals Council denied a request to review the ALJ's holding; thus, the ALJ decision stands as the final decision of the Commissioner of the Social Security Administration.

On September 14, 2004, Plaintiff filed the instant action. Then, on February 11, 2004, Plaintiff filed a Motion to Remand (#7). Defendant, the Commissioner of the Social Security Administration, opposed this action. Subsequently, on March 18, 2005, Defendant filed a Cross-Motion for Affirmance (#15).

The Honorable Lawrence R. Leavitt issued a Report and Recommendation (#14)

regarding this matter on April 8, 2005. He determined that Plaintiff's Motion to Remand (#7) should be denied and that Defendant's Motion for Affirmance (#10) should be granted.

On August 22, 2005, the Court held a hearing regarding the Report and Recommendation wherein the Court articulated its position that the Report and Recommendation was correct and that it was unlikely that Plaintiff's evidence merited a remand. On October 14, 2005, the parties filed a stipulation (#21) agreeing to allow Plaintiff additional time to compile and present supplementary evidence in support of her claim. On November 23, 2005, Plaintiff filed supplementary letters from Dr. Steve Glyman, and Renee M. Gordon-Sharp, Plaintiff's former employer. Defendant filed a response on February 3, 2006.

DISCUSSION

I. Standard of Review

The Court reviews *de novo* a magistrate judge's recommendations on determinations of eligibility for Social Security benefits. 28 U.S.C. § 636(b)(1)(A)(B)[1].

Under the Social Security Act, to qualify for disability insurance benefits, a claimant must establish: (1) that she is disabled within the meaning of the Social Security Act, specifically, that she was unable "to engage in any substantial gainful activity by reason of

[1] (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. (B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) . . .

any medically determinable physical or mental impairment," 42 U.S.C. § 423(d)(1)(A); (2) that her impairment(s) lasted "for a continuous period of not less than 12 months," id.; see also 20 C.F.R. § 404.1509; and (3) that her period of disability began while she was "insured for disability insurance benefits." 42 U.S.C. § 423(a)(1)(A).

A claimant is disabled if she proves: (1) that she is not presently engaged in a substantial gainful activity; (2) that her disability is severe; and (3) that her impairment meets or equals one of the specific impairments described in the regulations. Tackett v. Apfel, 180 F.3d 1094, 1098–99 (9th Cir. 1999).

The court's jurisdiction is limited to determining whether the Social Security Administration's denial of benefits is supported by substantial evidence in the administrative record. 42 USC § 405(g); see Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001). Substantial evidence has been defined as "more than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." De la Fuente v. F.D.I.C., 332 F.3d 1208, 1220 (9th Cir. 2003) (internal quotation and citation omitted). The reviewing court must consider the administrative record as a whole and weigh the evidence both supporting and detracting from the ALJ's decision. See Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). If the evidence is susceptible to more than one rational interpretation, the reviewing court will uphold the decision of the ALJ. See Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002).

In the instant case, Plaintiff claims that she is permanently disabled as she has been diagnosed as suffering from "myelopathic syndrome." She claims "new evidence" has been produced, which warrants remand to the Social Security Administration.

B. Consideration of New Medical Evidence

Plaintiff argues that the Court should remand her case to the ALJ so new medical evidence about the severity and length of her disorder may be considered. Under sentence six of section 405(g), the court "may at any time order additional evidence be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g).[2]

The meaning of the requirement that additional evidence be "material" to justify remand pursuant to § 205(g) is not obvious. While the term materiality has a commonly accepted meaning in evidence law, the meaning of the term in § 205(g) is somewhat different since it does not simply mean evidence that has a tendency to prove or disprove a disputed matter.

The Ninth Circuit held in Mayes that for new evidence to be "material under section 405(g)," the new evidence must bear "directly and substantially on the matter in dispute." 276 F.3d at 462 (citing Ward v. Schweiker, 686 F.2d 762, 764 (9th Cir. 1982)). Additionally, Plaintiff must demonstrate that there is a "'reasonable possibility' that the new evidence would have changed the outcome of the administrative hearing." Id. (citing Booz v. Secretary of Health & Human Servs., 734 F.2d 1378 (9th Cir. 1984)).

To demonstrate good cause, Plaintiff "must demonstrate that the new evidence was unavailable earlier." Id.; see also Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985) ("If new information surfaces after the Secretary's final decision and the claimant could not have

[2] In 1980, Congress, in response to a perception that the district courts were remanding cases where they merely disagreed with the decisions of administrative law judges, amended the sixth sentence of § 205(g) to provide that the power of the district courts to remand a case at any time was limited to cases in which there was a showing made that there was additional evidence that was new and material and there was good cause for failing to incorporate such evidence into the record in a prior proceeding.

obtained that evidence at the time of the administrative proceeding, the good cause requirement is satisfied.").

The "new evidence" presently at issue consists of letters written by Plaintiff's treating physicians, Gary Flangas, M.D. and Steven A. Glyman, M.D, regarding their opinions as to the likely diagnosis of Plaintiff's problems and potential treatments, and a letter written by Renee M. Gordon-Sharp, Plaintiff's former employer. Dr. Flangas's letter states in pertinent part that Plaintiff "has *evidence of* myelopathic syndrome which has been progressive and debilitating and affects her normal activities of daily living. She requires additional treatment, including *possibilities of interventional surgery*." (Gary Flangas, M.D., January 25, 2005, letter)(emphasis added). Dr. Glyman's letter states the following:

> [Plaintiff] has a problem with the cervical spinal cord *which may be due to* cervical degenerative disease *but possibly due* to a degenerative disorder. She is getting worked up [sic] by my office and by Dr. Gary Flangas. *It is possible that* she may need to undergo a surgical procedure. At the present time she is totally disabled, and I believe that she is permanently disabled based on this condition. She is unable to walk more than short distances. She has spasticity in her legs and has lack of motor control of her upper extremities. *I have only seen this individual at one time.* It is *my understanding that* her condition has gone on for some time prior to my seeing this individual. From what I can understand she has not changed greatly, and from *what they have told* me she has had this level of disability for many years. A review of her records would confirm these facts.

(Steven A. Glyman, M.D., January 21, 2005, letter) (emphasis added).

The second letter from Dr. Steven Glyman submitted on November 23, 2005, is an uncompleted check-off form questionnaire wherein Dr. Glyman has written additional comments indicating that in his opinion, the onset of Plaintiff's condition occurred prior to 1994. However, the letter fails to state affirmatively that Plaintiff had a disability prior to 1995. (Steven A. Glyman, M.D., November 23, 2005, letter). The letter specifically states that in Dr. Glyman's opinion, "[t]here is no question [Plaintiff's] symptoms and

abnormalities have been present prior to Dec. 1994." The letter indicates that Plaintiff's MRI taken in September of 1995, shows amongst other things, that Plaintiff had "significant degeneration," in her spine, which "[does] not occur quickly, but typically long term," and was "likely present prior to Dec. 1994." (Id. at 1.)

The letter from Plaintiff's former employer, Renee M. Grdon-Sharp ("Gordon-Sharp"), relates that Gordon-Sharp noticed Plaintiff's condition deteriorate during the year of 1989. According to Gordon-Sharp, Plaintiff began "stumbling, tripping, and falling," and dropping items. (Renee M. Gordon-Sharp, October 24, 2005, letter). The letter relates that due to Plaintiff's condition she decided to quit working so as not to hurt herself, or anyone else. (Id.)

The Social Security Act's statutory scheme requires that a disability be continuously disabling from the time of onset during insured status to the time of application for benefits, if an individual applies for benefits for a current disability after the expiration of insured status. Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1460 (9th Cir. 1995), citing Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

The criteria for "insured status" are set forth at 42 USC § 423(c) and related regulations. Plaintiff's "insured status" ended on December 31, 1994. Although a claimant may establish such continuous disabling severity by means of a retrospective diagnosis, a "[c]laimant is not entitled to disability benefits unless [s]he can demonstrate that [her] disability existed prior to the expiration of [her] insured status." Flaten, 44 F.3d at 1461, n.4. Deterioration in a claimant's condition subsequent to expiration of her insured status is "irrelevant." Id.

The principles set forth in Flaten are dispositive of this case. The letters sent by Plaintiff's treating physicians, dated January 21, 2005, and January 25, 2005, reflect Plaintiff's current condition, rather than Plaintiff's condition during the time period relevant to this appeal. The letter from Plaintiff's physician dated November 23, 2005, and letter from Gordon-Sharp likewise fail to establish conclusively that Plaintiff suffered from a disability prior to December 31, 1994.

The Court finds that the additional medical evidence does not indicate that Plaintiff had a disability during the period in question—prior to December 31, 1994; and is not material for the purposes of determining the onset date of Plaintiff's disability. Dr. Glyman alludes to a lengthy disability when he states, "It is my understanding that her condition has gone on for some time prior to my seeing [Plaintiff]. From what I can understand she has not changed greatly, and from what they have told me she has had this level of disability for many years." However, this statement, by his own admission, is only a reiteration of what Plaintiff told him regarding the duration of the problems. Dr. Glyman then states that, "A review of her records would confirm these facts." However, Plaintiff has not provided any new evidence that a medical professional has reviewed her medical records and demonstrated that she was disabled prior to the expiration of her insured status. See Flaten, 44 F.3d at 1461, n.4. Further, Dr. Glyman's more recent letter indicates that he did not review Plaintiff's records prior to 1995, and makes conclusory statements that Plaintiff's condition is a "degenerative" and "long-term" condition that likely existed prior to December 1994.

In short, these letters do not establish that Plaintiff was disabled before December 31, 1994. Therefore, there is no "new evidence" that would show that Plaintiff was disabled during the disability insurance benefit pursuant to Title II of the Social Security Act, 42

U.S.C. § 401, et seq. Additionally, Plaintiff has failed to demonstrate good cause for failing to produce the recent additional evidence earlier. Accordingly, Plaintiff's Motion to Remand (#7) this case so that the Secretary can consider this "new evidence" is denied.

CONCLUSION

IT IS HEREBY ORDERED that Magistrate Judge Lawrence R. Leavitt's Report and Recommendation (#14) is *affirmed*. Furthermore, IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (#7) is *denied*, and Defendant's Motion for Affirmance (#10) is *granted*.

DATED: September 11, 2006.

ROBERT C. JONES
UNITED STATES DISTRICT JUDGE